IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 26

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA, AND
TITLE & TRUST COMPANY OF FLORIDA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on May 26, 1958, and its Order denying rehearing therein, entered June 26, 1958.

CITATIONS TO OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court of the United States for the Southern District of Florida were unreported and are printed in Appendix B hereto, infra, page 19. The Amendment to Findings of Fact and Conclusions of Law of the District Court was un-

reported and is printed in Appendix B hereto, infra, page 27. The Opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, page 30, is reported in 255 F. 2d 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1958 (R. 115; p. 30, infra). A timely Petition for Rehearing filed on June 14, 1958 (R. 128) was denied on June 26, 1958 (R. 176). The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

QUESTIONS PRESENTED

I. Whether the United States, on a tax assessment which was not a lien on certain real property on the date of execution and recordation of a Florida Real Estate Mortgage to a National Bank, may properly be awarded priority over the Bank as to the real estate under the following circumstances: Kimbel and his wife owned the real property in an estate by the entireties under Florida law. They borrowed from the Bank certain funds on June 17, 1953. Intending to secure certain other obligations of Kimbel to the Bank, a special typewritten clause, reading as follows:

> "The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the mortgagee from the mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid.";

was placed in the mortgage. A printed clause in the mortgage read as follows:

> "It is understood that each of the words, note, mortgagor and mortgagee, respectively, whether in the singular

or plural anywhere in this mortgage, shall be singular if one only and shall be plural jointly and severally if more than one, and that the word their as used anywhere in this mortgage shall be taken to mean his, her or its, wherever the context so implies or admits."

Kimbel and his wife, and the Bank, as a matter of pleading and fact intended that this mortgage should constitute security to the Bank for the then past due note of a partnership of which Kimbel was a member, which note was both signed by him as partner-maker and as individual endorser. Mrs. Kimbel thereafter died, and the title to the property then vested in Kimbel. Upon her death, the lien for the tax due to the United States attached to the real property. The claim of the United States was for a tax due by the same partnership. The Government then claimed priority for its tax lien over the Bank's claim.

II. Whether the United States, under the facts and circumstances involved in Question I was entitled to priority as to said real estate over the Bank as against the Bank's claim of lien under said language to secure another note endorsed by Kimbel, past due at the date of the mortgage, the maker of which note was one Thompson, Kimbel, his wife, and the Bank having intended that the mortgage should constitute security for Kimbel's liability under said endorsement.

III. Whether the United States, under the foregoing circumstances, may properly be awarded priority over the Bank as against the claim of the Bank that said mortgage secured the endorsement by Kimbel of certain corporation notes made subsequent to the making and delivery of the mortgage, but while the principal note secured by the mortgage was still outstanding, Kimbel, his wife and the Bank having intended that this mortgage should constitute security to the Bank for such subsequent endorsements.

STATUTES INVOLVED

The Statutory provisions involved are Sections 3670 and 3672 of the Internal Revenue Code of 1939, and Sections 674.19(7), 674.20, 674.22, 674.62, 674.68 and 697.04, Florida Statutes, 1941: They are printed in Appendix A, infra, pp. 16 - 18.

STATEMENT

This suit was brought by American National Bank of Jacksonville, Florida, in the Circuit Court in and for the Fourth Judicial Circuit of Florida, Duval County, Florida, to foreclose a mortgage from C. Albert Kimbel and his wife, Ida T. Kimbel, dated June 17, 1953, recorded June 18, 1953 (R. 1). The United States was made a party pursuant to 28 U.S.C. Section 2410 and caused the action to be removed to the United States District Court for the Southern District of Florida, as authorized by 28 U.S.C. Section 1444 (R. 2). In addition to the United States, several other parties claiming liens against the property were made parties defendant (R. 2).

The mortgage sought to be foreclosed was partly typewritten and partly printed (R. 11-20; 116) and encumbered a residence in Jacksonville, Florida, the title to which was, at the time of the mortgage, held as an estate by the entireties (R. 4; 115). The mortgage secured a Note, copied therein, signed both by Kimbel and his wife, payable to the order of the Bank in the principal sum of $24,000.00 (R. 13-14; 21-22). The mortgage secured the payment of principal and interest of the mortgage note, advances for taxes and insurance, and, in the event of foreclosure, the costs of foreclosure, including attorneys' fees (R. 3; 15-17; 116).

The mortgage contained a specially typewritten clause (R. 2: 15; 116) reading as follows:

> "The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the mortgagee from the mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid."

The mortgage also contained, in its printed portion, the following provision:

> "It is understood that each of the words, note, mortgagor and mortgagee, respectively, whether in the singular or plural anywhere in this mortgage, shall be singular if one only and shall be plural jointly and severally if more than one, and that the word their as used anywhere in this mortgage shall be taken to mean his, her or its, wherever the context so implies or admits." (R. 2; 15).

The foreclosure Complaint contained the following, in addition to the usual allegations:

> "VII.
>
> "As appears from said Mortgage, therein and thereby the Mortgagors agreed as follows:
>
> "'The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the Mortgagee from the Mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid.'
>
> "In said Mortgage it is further provided that where the word Mortgagors appears anywhere in this mortgage, shall be . . . plural jointly and severally . . . where-

ever the context so implies or admits.' It was the specific intention of this Mortgage and the expressed purpose of the parties that the same should secure all sums of money which were then or might thereafter be due on either the direct or indirect liabilities of the Mortgagor, C. Albert Kimbel." (R. 2).

The Complaint went on to claim (R. 3; 54) that the Mortgage secured each and every the hereinafter mentioned Notes:

1. A past due Note made by Duval Electric Company, a partnership, dated February 15, 1953, due by its terms March 13, 1953, signed "Duval Electric Co. C. A. Kimbel Pres.", commencing with the words "I promise to pay", in the original principal amount of $7,903.07, which had been reduced to $5,869.66, and was endorsed by C. A. Kimbel. At the time this Note was given, Duval Electric Company was a partnership consisting of C. Albert Kimbel and two others. The Note was endorsed by C. A. Kimbel. (R. 3; 5; 23-24; 26; 117).

2. Also at this time Mr. Kimbel had endorser liability on a past due Note of T. H. Thompson, dated February 27, 1953, due by its terms March 25, 1953, payable to the order of Duval Electric Co. (the partnership) endorsed:

"Duval Electric Company
by C. A. Kimbel
Pres
C. A. Kimbel",

being a Note of T. H. Thompson, in the original amount of $753.95, which had been reduced to $600.00 (R. 25; 28; 55).

3. A group of corporate Notes of Duval Electric Company, Inc., all made subsequent to the date of the Mortgage.

bearing various dates, and on which, by the time of foreclosure, $15,908.72 was due the Bank. (R. 29-50; 55).

Mrs. Kimbel was not personally liable for the payment of any of the Notes described in the preceding paragraphs numbered 1, 2 and 3. (R. 117).

Mrs. Kimbel died on December 1, 1954. (R. 4; 117).

The United States was due from the partnership known as Duval Electric Company, of which Kimbel was one of three partners as aforesaid, FICA and FUTA taxes totalling $12,200.00, which taxes were duly assessed and claims of lien for which had been duly recorded as of a date prior to the date of the Mortgage. (R. 5; 115).

Pursuant to stipulation between the Bank and the United States, the District Court entered its Summary Decree of Foreclosure and ordered the mortgaged property sold, by said Summary Decree of Foreclosure reserving the question of priorities between the Bank and the United States (R. 3). The property sold for $35,000.00 (R. 4). Since the claims of the Bank and the United States far exceeded the proceeds of the sale and the claims of all other defendants were subsequent in point of time both to the claims of the United States and of the Bank, no specific findings as to their interests were made nor needed to be made (R. 6). Of the $35,000.00 received from the foreclosure sale, $14,000.00 was held out and the parties litigated over that sum, in lieu of the real property (R. 4). In the litigation over same, Title & Trust Company of Florida, which had insured the $24,000.00 mortgage indebtedness, was permitted to intervene to oppose the claim of the United States to priority as to that obligation (R. 4).

Both the District Court and the Court of Appeals for the

Fifth Circuit have, in every holding, ruled that the Bank's claim was prior to that of the Government as regards the $24,000.00 joint Note of Mr. and Mrs. Kimbel (R. 57; 120). Initially the District Court held that the claims of the United States became liens upon the property on the death of Mrs. Kimbel, but that the mortgage, by its terms, "limited the lien of the mortgage to their joint obligations" (R. 57). It therefore held that the United States should receive the proceeds of the sale to the extent of the excess thereof over what was due the Bank on the joint Note. (R. 7; 58).

On July 20, 1956, the Bank filed a Motion for New Trial addressed to this ruling, and on July 26, 1956, it filed a Motion For Relief Under Rule 60(b). (R. 7).

Both the United States and the Bank appealed the Court's ruling, when, within sixty days, neither Motion had been acted upon, and on January 17, 1957, the Court of Appeals for the Fifth Circuit, on Motion of the Bank, remanded the cause to the District Court, with permission and authority to said Court, in its discretion, to reopen and reconsider its Judgment aforesaid. (R. 8).

The District Court granted a partial new trial, limited to the issue of whether or not the Mortgage secured the individual obligations of C. Albert Kimbel in the Notes described in paragraphs 1, 2 and 3 above (R. 8-9). On partial new trial, the District Court ruled in favor of the Bank, holding that parol evidence was permissible to aid the Court in the construction of the instrument, and from that evidence finding that it was the intent of C. Albert Kimbel and Ida T. Kimbel, in executing the Mortgage, to secure said individual obligations, and that the Mortgage was effective to do so. (R. 9; 102-103; 118).

The United States appealed from this decision of the Court and, on appeal, the Court of Appeals for the Fifth Circuit reversed, holding that parol evidence was not so permissible and that to have accomplished such security "language different from that which was used was required." (R. 124).

REASONS FOR GRANTING THE WRIT

1. This is one of "those Revenue cases" to which, as a class, considerable odium is beginning to attach. In an able article, by a former attache of the Solicitor General's office, reported in New York University Law School's "Tax Law Review", Volume 13, 247-311, and 459-544, among many other things, it is said:

> "Few can complain at efforts of the Government and the Courts to close the avenues by which a taxpayer can insulate his own wealth from the Tax Collector, but they have not stopped there. In recent years there has been a strong tendency to 'rob Peter to pay Paul's taxes'." (Cit. 459)

Plumb points to the rising tide of effort by Government tax men constantly to spread the field into which they reach to collect the Federal Revenue. He says:

> "A mortgage given for an antecedent debt . . . is, of course, good against the tax lien." (Cit. 497, 498)

Then in a footnote, he adds:

> "Even that seemingly obvious point was litigated by the Government unsuccessfully (citing a case)."

In the report currently under preparation, as now revised, the Committee on Relative Priority of Government and Private Liens, under the Section of Real Property, Probate and Trust Law of the American Bar Association, the enormous

National interest in this field is clearly made apparent. Under the heading "Continuing and Growing Importance of the Subject", after pointing out that 25,000 copies of its 1956 Report were printed, in addition to distribution through American Bar Association's normal publication channels they say:

> "The unprecedented demand for copies of our 1956 report continues, the last of the reprints having been distributed at a panel discussion on Federal Liens at the St. Louis Regional Meeting held June 13, 1958. The large attendance at that meeting and at a similar panel discussion at the Mid-Year Meeting at Atlanta indicates the growing impact of Federal Liens upon the day-by-day work of our members. That impact is reflected, to, in the growing flood of Federal litigation. Federal Lien litigation handled by the Justice Department is now the second largest category in terms of numbers of suits (after refund suits)."

Involved in this Petition is an important State question, procedurally approaching Constitutional dimensions in the realm of due process, and approaching involvement of the contract clause. While the converse of a case important from the standpoint of securing the National rights, in that the point involved is the importance of the freedom of the business of the Nation from unjust interference by the tax collection procedure, it is submitted that in the sense that it involves the people of the Nation, as distinguished from the Government itself, the securing of the National rights is involved.

2. The decision of the Court below in the instant case is directly in conflict with the decision of this Court in *Francis vs. McNeal*, 228 U. S. 695, in this:

In the case at bar, the Government did not contend, but

assumed, that an obligation of a partnership created, as to each member of the partnership, an individual liability. The Government submitted to the Circuit Court of Appeals the theory that the provision of the Mortgage to be construed referred only to debts due from the mortgagors together, and "not from each as individuals." The Circuit Court of Appeals took it upon itself to go beyond the record and to decide, without aid of counsel by briefs or argument, that the partnership obligation was not the liability of a partner "in an individual and personal capacity" (R. 123). Reasoning in support of this conclusion, the Court cited a statement from *Forsyth vs. Woods*, 78 U. S. (11 Wall.) 484, to the effect that a partnership as distinct from the partners, from which it would seem that the partnership debts are different from other joint debts of the partners, then applying supposed "a fortiori" reasoning that therefore such debts differ in character from the debts of husband and wife or either of them. This contravenes a later holding by this Court in *Francis v. McNeal*, supra, that partnership debts "are debts of the members of the firm, and that the individual liability . . . is not collateral . . . but primary and direct." (R. 143)

3. The decision of the Court below is directly in conflict with another decision of the same Court, namely, *Underwood v. U. S.*, 118 F. 2d 760, where it was held that partners were liable individually for any debts contracted in the name of the partnership.

4. The decision of the Court below is in conflict with applicable State law on the subject of the reception of parol evidence, the decision below ignoring the Rule on the subject in Florida as established in *McEwen vs. Growers' Loan & Guaranty Co.*, 139 So. 805, and *Jackson v. Parker*, 15 So. 2d 451. The decision even ignored the general law permitting parol proof of the background circumstances of any trans-

action to aid in the interpretation of the transaction, as set forth in *St. Lucie County Bank & Trust Co. v. Aylin*, 94 Fla. 528, 114 So. 438, from which the Court quoted at some length from the Opinion's forepart. A subsequent portion of the *Aylin* decision contained the following language:

> ". . . the great object, and practically the only foundation, of rules for the construction of contracts, is to arrive at the intention of the parties. This is a most conspicuous and far-reaching rule, and involves the nature of the instrument, the condition of the parties, and the objects which they had in view; and, when the intent is thus ascertained, it is to be effectuated, unless forbidden by law."

In this regard, the decision is, as well, in conflict with the decisions of this Court following:

> *Shirras v. Caig*, 7 Cranch 34 (Chief Justice Marshall);
> *Jones v. New York Guaranty & Indemnity Co.* 101 U.S. 622.

The effect of the decision, review of which is sought, is to deny this Petitioner the procedural right to make known to the Court the circumstances of the parties and the object they had in view in contracting. When the lower Court declared itself able to ignore these circumstances, it has further found itself able to read completely out of the contract the specially typewritten clause, leaving it no meaning whatsoever and bringing the decision in conflict not only with applicable State decisions, but also with applicable decisions of this Court in the following cases:

> *Hull v. Burr*, 58 Fla. 432, 50 So. 754;
> *Ross v. Savage*, 66 Fla. 106, 63 So. 148;
> *Florida East Coast Ry. Co. v. City of Miami*, 76 Fla. 277, 79 So. 682;

Harrison v. Fortlage, 161 U. S. 58;
And see *Wiggins v. State of Florida* (Fla. District Court of Appeals) 101 So. 2d 833.

5. The decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The lower Court departed from the Rule that points not raised before the Court will not be determined, and, based upon its own research, without the aid of counsel, undertook to determine important State questions, in a way so as unduly to protect the Federal Revenue and tend to throw into confusion accepted State business procedures, of utmost importance to the economy of the whole Nation. This is not a case where the Tax Collector has tried to go as far as the Court itself, voluntarily and without necessity, has gone. The effect of the decision is to make it seem that the Circuit Court of Appeals is unduly zealous of the Federal Revenue, and that litigants cannot afford to litigate questions at issue between them and the Government, for fear that the Courts will follow, of their own initiative, the "strong tendency", pointed out by Mr. Plumb, "to 'rob Peter to pay Paul's taxes' ".

6. In failing to apply Florida law in establishing and declaring the rights of Petitioner under the Florida real estate mortgage in question, and ignoring the placement upon the mortgagor, C. A. Kimbel, of direct personal liability, by virtue of the terms and provisions, of, among other Statutes, *Sections 674.20 and 674.68, Florida Statutes, 1941*, (infra, pp. 16, 17), the Court of Appeals has acted unconstitutionally. It has ignored its own statement in the instant case that "the rules of property and fixing the incidents of property ownership are rules of State law which the Federal Courts will respect" (citing *Poe v. Seaborn*, 282 U. S. 101). Its decision conflicts with the subsequent decision of this Court

in *Commissioner v. Stern*, decided June 9, 1958, (2 L. Ed. 2d 1126), which imports into the tax enforcement field the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64. That is to say, by failing to apply the Florida law there has been, as applied to the Circuit Court of Appeals in this case, "an unconstitutional assumption of powers" (304 U. S. 79) by our Circuit Court of Appeals. The Florida Statutes having to do with the very subject of the matter of the liability of an endorser of a Note were called to the attention of the Circuit Court of Appeals in a timely Petition for Rehearing (Ground 6, R. 129) and in the Brief filed by this Petitioner in support of its Petition for Rehearing (R. 135, et seq., esp. at R. 142, 173 and 174), yet the Court, in derogation of the State Statutes, adhered to its reasoning in its May 26, 1958, opinion, which overlooked and ignored the Statutes.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

W. GREGORY SMITH,
Attorney for Petitioner.

August 6, 1958

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Petition and Appendices has been made on each of the following parties in the manner indicated:

On the:

Solicitor General,
Department of Justice,
Washington 25,
D. C.;

by mailing same to him with air mail postage prepaid, addressed as above.

On the United States Attorney for the Southern District of Florida, and on Ray W. Richardson, Jr., Attorney for Respondent, Title & Trust Company of Florida, by delivery, at the office of counsel, to counsel or a Clerk therein.

W. GREGORY SMITH,
Attorney for Petitioner.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refused to pay the same after demand, the amount * *.* shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such a person. (26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3672 (as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862). VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Florida Statutes, 1941:

SEC. 674.19(7). AMBIGUOUS LANGUAGE AND OMISSIONS.

Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

(7) Where an instrument containing the words, "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

SEC. 674.20. WHO NOT LIABLE.

No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But *one who signs in a trade* or assumed *name will be liable*, to the same extent *as if he had signed in his own name.* (Emphasis supplied.)

SEC. 674.22. SIGNING IN BEHALF OF PRINCIPAL.

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal does not exempt him from personal liability.

SEC. 674.62. ADMISSION OF MAKER.

The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

SEC. 674.68. INDORSING WITHOUT QUALIFICATION.

Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and

(2) That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, *he engages that* on due presentment, *it shall be* accepted or *paid*, or both, as the case may be, according to its tenor *and that if* it be *dishonored* and the necessary proceedings on dishonor be duly taken, *he will pay the amount thereof* to the holder, or to any subsequent indorser who may be compelled to pay it. (Emphasis supplied.)

SEC. 697.04. FUTURE ADVANCES MAY BE SECURED.

(1) Hereafter, any mortgage or other instrument given for the purpose of creating a lien on real or personal property, or both, including agricultural, horticultural, or fruit crops, planted, growing, or to be planted, grown, or raised, *to secure agricultural loans*, may secure not only existing indebtedness but also such future advances, whether obligatory or otherwise, as are made within six years from the date thereof, to the

same extent as if such future advances were made on the date of the execution of such mortgage or other instrument, although there may be no indebtedness outstanding at the time any advance is made. Such lien, as to third persons without actual notice thereof, shall be valid as to all such indebtedness and future advances from the time the mortgage or other instrument is filed for record as provided by law. The total amount of indebtedness that may be so secured may decrease or increase from time to time, but the total unpaid balance so secured at any one time shall not exceed a maximum principal amount which must be specified in such mortgage or other instrument, plus interest thereon, and any disbursements made for the payment of taxes, levies, or insurance on the property covered by the lien, with interest on such disbursements. This section shall not apply to any mortgages, shipping contracts, or other instruments made and given by naval stores operators and producers to secure existing loans and future advances by naval stores factors. (Emphasis supplied.)

(2) As against the rights of creditors or subsequent purchasers for a valuable consideration, actual notice or record notice of advances to be made at the option of the lender, under the terms of such mortgage or other instrument, shall be valid only as to such advances as are to be made within six years from the date of such mortgage or other instrument; provided that this section shall not apply to any mortgages, shipping contracts, or other instruments made and given by naval stores operators and producers to secure existing loans and future advances by naval stores factors.

(3) Any such mortgage or other instrument shall be prior in dignity to all subsequent encumbrances, including statutory liens, except landlords' liens.

APPENDIX B

Findings of Fact and Conclusions of Law of the Honorable George W. Whitehurst, United States District Judge for the Southern District of Florida, Filed - July 12, 1956

(51)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JACKSONVILLE DIVISION

AMERICAN NATIONAL BANK OF JACKSONVILLE, a corporation,

Plaintiff,

No. 3187-Civil-J

-vs-

C. ALBERT KIMBEL, et al.

Defendants.

FILED JACKSONVILLE, FLA., JULY 12, 1956

JULIAN A. BLAKE, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This suit was brought by the Plaintiff in the Circuit Court in and for the Fourth Judicial Circuit of Florida for Duval County, to foreclose the Mortgage hereinafter referred to. In addition to the surviving Mortgagor, C. Albert Kimbel, several parties claiming liens against properties in his name were also made parties defendant. Included among such parties was the United States of America, which was made Defendant pursuant to the terms of Title 28, U. S. Code, Section 2410. As authorized by the terms and provisions of Title 28, U. S. Code, Section 1444, the United States of

America caused this action to be removed to this Court and this Court has jurisdiction of this cause by virtue of such removal.

2. Pursuant to stipulation between the Plaintiff and the United States of America, under date of November 23, 1955, this Court entered its Summary Final Decree of Foreclosure settling the equities of the cause with the Plaintiff and against the Defendants, severally, save in the matter of priorities between the Plaintiff and the United States of America which matter of priorities was reserved for future determination. By said Decree, the Plaintiff was adjudged to have a lien under its Mortgage to secure its principal Mortgage Note and the following several sums:

Principal balance on principal Mortgage Note	$23,534.80
Interest thereon	1,395.74
1954 Duval County taxes advanced	337.72
Interest thereon	15.13
1954 City of Jacksonville taxes advanced	113.71
Interest thereon	5.05
Cost of Abstract	30.00
Interest thereon	.98
Attorneys' fees	3,000.00
Court costs	82.00
The total due on the principal and primary Note secured by the Plaintiff's Mortgage was the sum of	$28,515.13

It was adjudged that Plaintiff had a lien to secure all of these amounts on the following described property situate in Duval County, Florida:

Lot Three (3), Block One Hundred Five (105), Better Homes Company's First Addition to San Marco, according to plat recorded in Plat Book 14, pages 20 and 21, of the current public records of Duval County, Florida;

under its Mortgage from C. Albert Kimbel and Ida T. Kimbel, his wife, dated June 17, 1953, recorded in the public records of Duval County, Florida, June 18, 1953, in Mortgage Book 1560, page 539. A sale of this property by a Special Master was ordered, with the direction and provision, pursuant to stipulation, that the first proceeds of the sale should be held by the Special Master in lieu of the property itself, and that the parties should litigate the matter of priorities as against the funds to be held by the Special Master, so to stand in lieu of the real property as aforesaid.

3. The sale of the real property was duly held and brought the sum of $35,000.00. After adjustments in the figures, due to collections by the Court appointed Receiver, $14,000.00 was held by the Special Master in his "Special Master's Escrow Account", as authorized by the Orders of this Court, and the parties litigated over said sum. Title & Trust Company of Florida, a title insurance organization, was permitted to intervene to oppose the claim of the United States of America to priority over the Plaintiff's Mortgage, which Mortgage said Company had insured. Plaintiff, the United States, and Title & Trust Company of Florida all moved for Summary Judgment. The facts are substantially undisputed and only the matter of priorities has been in issue.

4. The United States of America bases its claims upon the following taxes, which are hereby adjudged to have been duly assessed and Claims of Lien for which have been duly recorded in the public records of Duval County, Florida, as

against the Defendant, C. Albert Kimbel, as indicated in the following table.

Tax	Assessment	Date of Filing of Notice of Lien	Balance Due
FICA	$2,499.45	January 10, 1952	$1,015.53
FICA	1,146.71	December 30, 1952	686.41
FICA	1,256.51	May 4, 1953	1,256.51
FICA	1,146.71	May 4, 1953	686.41
FICA	1,740.10	May 4, 1953	1,740.10
FUTA	130.15	May 4, 1953	130.15
FICA	637.98	May 4, 1953	637.98
FICA	1,767.48	May 4, 1953	1,767.48
FUTA	118.57	May 4, 1953	113.57
FICA	2,971.90	May 4, 1953	2,939.59
FUTA	1,108.70	July 23, 1954	1,108.70
FUTA	117.80	July 23, 1954	117.80
The total due on the Government Liens hereby adjudged is the sum of			$12,200.23

5. In addition to its primary Note secured by said Mortgage, the Plaintiff had provided in and by its said Mortgage that:

> "The Mortgagors hereby agree that the lien of this Mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the Mortgagee from the Mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid."

Under this provision the Plaintiff claimed that its mortgage secured the following several obligations due it by the defendant, C. Albert Kimbel:

(a) Note of C. Albert Kimbel as a principal obligor dated February 13, 1953, for $7,903.07, the balance due upon which is $5,868.66 principal, together with interest to June 14, 1955, in the amount of $143.63, and additional interest after said date at the rate of 81¢ per day.

(b) Obligation of C. Albert Kimbel, as Indorser on Note of T. H. Thompson, dated February 27, 1953, for $753.95, the balance due upon which is $600.00 principal, together with interest to June 15, 1955, in the amount of $56.30, and additional interest after said date at the rate of 10¢ per day.

(c) Obligation of C. Albert Kimbel, as Indorser on Notes of Duval Electric Co., Inc., dated, respectively, May 7, 1954, July 2, 1954, July 9, 1954, August 6, 1954, August 13, 1954, August 20, 1954, August 27, 1954, September 3, 1954, September 10, 1954, September 15, 1954 and September 24, 1954, in the respective amounts of $1,200.00, $1,216.00, $1,345.90, $1,539.85, $1,319.40, $1,514.00, $696.40, $2,148.00, $2,079.80, $2,300.30 and $1,167.25, for the face amount of each Note, except in the case of the May 7, 1954 note, on which only $87.00 principal is due, the total principal balance of all of which Notes is $15,908.72, plus interest from the date of each note bears at six percent per annum.

This Court finds that each of the said obligations was the obligation of C. Albert Kimbel due the Plaintiff as aforesaid.

6. It was alleged in paragraph VII of the complaint which was affirmed in the affidavit of Joseph C. Gill attached to the Plaintiff's Motion for Summary Judgment that it was the specific intention of the mortgage and the expressed purpose of the parties that same should secure all

sums of money which were then or might thereafter be due to the Plaintiff on either the direct or indirect liabilities of the mortgagor, C. Albert Kimbel. The plaintiff offered to produce testimony that the said mortgage was given to secure both the principal promissory note and the said individual note and the said other obligations of C. Albert Kimbel which offer was rejected by the Court, on the ground that the instrument was unambiguous.

7. The plaintiff has claimed that it has a lien against the property originally sought to be foreclosed upon under its mortgage, not only for its primary principal obligation aforesaid, amounting to $28,515.13, but also for the direct liability of C. Albert Kimbel adjudged in 5(a) of $5,868.66, and indirect liabilities of C. Albert Kimbel to it mentioned in paragraph 5 (b) of $600.00, and in 5 (c) of $15,908.72, or a grand total of $50,892.51. The United States of America claims that its Tax Liens are prior in law to the Plaintiff's lien, not only as against the primary principal obligation due the Plaintiff, but also as against the obligations mentioned in paragraph 5 of these Findings of Fact.

8. The real property covered by the Claims of Lien before the Court in this cause was held by C. Albert Kimbel and Ida T. Kimbel, his wife, as an estate by the entireties up until the date of the death of the said Ida T. Kimbel which occurred December 1, 1954. On this latter date the estate by the entirety terminated and title was, from that date forward, held solely by the defendant, C. Albert Kimbel.

9. Inasmuch as the claims of the United States of America and of this Plaintiff, when combined, consume and far exceed the proceeds of the Special Master's sale, the Court deems it unnecessary to make specific findings with regard to the claims and interests of the other defendants in this action, save to say that the claims of all of them are

subsequent in point of time and/or law to more than $35,000.00 of the clearly valid and prior claims of the Plaintiff and of the United States of America combined.

10. Pursuant to the stipulation between the parties, there is on hand in the "Special Master's Escrow Account" the sum of $14,000.00 against which priorities can and must be determined. The Special Master's Report of Deed and Disbursements shows the make-up of this fund.

CONCLUSIONS OF LAW.

1. The mortgage of the plaintiff was valid security for the primary principal obligation by it secured, as well as for the other items mentioned in paragraph 2 of the Findings of Fact.

2. Although notices of the majority of the Government's claims of liens were recorded prior in point of time to the date of execution and recording of the plaintiff's mortgage, nevertheless, the Government's claims of liens did not constitute liens upon the estate by the entireties held by C. Albert Kimbel and Ida T. Kimbel, for which reason the Plaintiff's primary claim is prior in law to the claims of the United States of America. *United States v. Hutcherson*, (CA—8;1951) 188 F. 2d 326.

3. The claims of the United States became liens on the real property involved herein upon the death of Ida T. Kimbel on December 1, 1954.

4. By the terms of the document itself the mortgagors have limited the lien of the mortgage to their joint obligations. As none of the obligations of C. Albert Kimbel, enumerated in paragraph 5 of the Findings of Fact, were also the obligations of Ida T. Kimbel, such obligations could not be impressed on the property without the consent of Ida T.

Kimbel. The mortgage does not provide that Ida T. Kimbel became obligated for the personal obligations of C. Albert Kimbel and is legally ineffectual to subject her interest in the property to such obligations. Therefore, the liens of the United States of America have priority over the claim of the Plaintiff to the excess over the sums mentioned in paragraph 2 of the Findings of Fact.

5. It follows that the Plaintiff should receive all proceeds of the foreclosure sale save the amount of $6,308.58 mentioned in the Special Master's Report of Deed and Disbursements, which sum should be paid to the United States of America for application against its liens herein adjudged.

6. Default having been duly and regularly entered against the defendant, C. Albert Kimbel, for his failure to plead to the cross-claim of the United States of America, the United States of America is entitled to a judgment against C. Albert Kimbel as prayed for in said cross-claim.

7. This Court, by its judgment to be entered herein, should reserve jurisdiction for the purpose of entering such deficiency judgments as may be proper.

Let judgment be entered accordingly.

Dated at Miami, Florida, July 12, 1956.

GEORGE W. WHITEHURST
United States District Judge

Copies to:

Messrs. Smith & Axtell

United States Attorney (House)

Messrs. Patterson, Freeman, Richardson & Watson (Richardson)

Amendment to Findings of Fact and Conclusions of Law of the Honorable George W. Whitehurst, United States District Judge for the Southern District of Florida, Filed - May 9, 1957

(102)

No. 3187-Civil-J

FILED JACKSONVILLE, FLA., MAY 9, 1957

JULIAN A. BLAKE, Clerk

AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court granted a partial new trial upon the sole issue of whether or not the mortgage from the Defendants, C. Albert Kimbel and Ida T. Kimbel, his wife, to Plaintiff, should be construed so as to secure individual obligations of the said C. Albert Kimbel to Plaintiff, and testimony having been taken upon said issue, and the Court having determined that said issue should be resolved in favor of the Plaintiff, and considering that its Findings of Fact and Conclusions of Law should be modified accordingly, now the Court does amend its Findings of Fact and Conclusions of Law filed herein on the 12th day of July, 1956, as follows:

1. Finding 5(a) is amended to read as follows:

(a) Note of C. Albert Kimbel as a principal obligor dated February 13, 1953, for $7,903.01, the balance due upon which is $5,800.57 principal, together with interest to April 27, 1957, in the amount of $543.03.

2. Finding 5, paragraph following paragraph "(c)" and the last paragraph of Finding 5 are amended to read as follows:

The provisions of the mortgage are ambiguous. Parol

evidence is admissible to aid the Court in the construction of the provision above quoted. Evidence has been taken and the Court finds that it was the intent of C. Albert Kimbel and Ida T. Kimbel, in executing said mortgage, to secure individual obligations of the said C. Albert Kimbel to Plaintiff.

The Court finds that each of the obligations in paragraphs (a), (b) and (c) above was an obligation of C. Albert Kimbel due the Plaintiff intended to be secured by said mortgage.

3. Finding 6 is hereby eliminated from the Court's Findings of Fact and Conclusions of Law.

4. Finding 7 is amended to read as follows:

The Plaintiff has claimed that it has a lien against the property originally sought to be foreclosed upon under its Mortgage, not only for its primary principal obligation aforesaid, amounting to $28,515.13, but also for the liabilities in 5(a) of $6,343.60 ($5,800.57 principal and $543.03 interest), 5(b) of $600.00, and in 5(c) of $15,908.72. The United States of America claims that its Tax Liens are prior in law to the Plaintiff's lien, not only as against the primary principal obligation due to the Plaintiff, but also as against the obligations mentioned in paragraph 5 of these Findings of Fact.

5. Conclusion of Law No. 4 is amended to read as follows:

As, by the said mortgage, the primary obligations of the Kimbels adjudicated in paragraph 2 of the Findings of Fact, as well as the obligations of C. Albert Kimbel, adjudicated in paragraph 5 of the Findings of Fact

were, all, secured by the mortgage, the Plaintiff has priority over the claims of the United States of America to all sums held in the Special Master's Escrow Account.

6. Conclusion of Law No. 5 is amended to read as follows:

It follows that the Plaintiff should receive all proceeds of the foreclosure sale.

Let amended judgment be entered accordingly.

Dated at Jacksonville, Florida, this 9 day of May, 1957.

GEORGE W. WHITEHURST
United States District Judge.

Opinion of the United States Court of Appeals for the Fifth Circuit, Jones, Circuit Judge, Filed - May 26, 1958

(115)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16989

UNITED STATES OF AMERICA,
Appellant

versus

AMERICAN NATIONAL BANK OF JACKSONVILLE AND TITLE & TRUST COMPANY OF FLORIDA,
Appellees

Appeal from the United States District Court for the Southern District of Florida.

(May 26, 1958.)

Before RIVES, TUTTLE and JONES, Circuit Judges.

JONES, Circuit Judge: C. Albert Kimbel and his wife, Ida T. Kimbel, owned a residence in Jacksonville, Florida. The title was held as an estate by the entireties. The United States filed tax liens on various dates prior to June 18, 1953, against C. Albert Kimbel for tax assessments aggregating about eleven thousand dollars. Thereafter further liens were filed on tax assessments of about twelve hundred dollars. None of these taxes was a liability of Mrs. Kimbel. On June 17, 1953, Mr. and Mrs. Kimbel gave a mortgage on the residential property to The American National Bank of Jacksonville to secure a note signed by each of them pay-

able to the Bank in the principal sum of $24,000. The mortgage was recorded June 18, 1953. It authorized the mortgagee to advance funds for taxes and insurance premiums. It secured the payment of the principal and interest of the mortgage note, advances for taxes and insurance and, in the event of foreclosure, the costs of foreclosure including attorneys' fees. The mortgage, partly printed and partly typewritten, included among its provisions the following typed clause:

> "The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the Mortgagee from the Mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid."

The mortgage also contained a printed provision that:

> "It is understood that each of the words, note, mortgagor and mortgagee respectively, whether in the singular or plural anywhere in this mortgage, shall be singular if one only and shall be plural jointly and severally if more than one, * * * ."

At the time the mortgage was given, the Bank held a collateral note made by Duval Electric Co. This note was dated February 13, 1953. It is signed "Duval Electric Co. C. A. Kimbel, Pres." It pledged warehouse receipts covering electrical equipment and materials. The original principal amount was $7,903.07, which had been reduced to $5,869.66. At the time this note was given, Duval Electric Company was a partnership. There were three partners, C. Albert Kimbel and two others. The note was endorsed by C. A. Kimbel. At the time the mortgage was given, Mr. Kimbel

had endorser liability on a note of T. H. Thompson discounted by the Bank which was payable to and endorsed by Duval Electric Co. in the amount of $600. Interest accrued on all of these obligations. Mrs. Kimbel was not personally liable for the payment of any of them. Mrs. Kimbel died on December 1, 1954. The Bank instituted a suit in the Circuit Court for Duval County, Florida, for the foreclosure of the mortgage. The United States was made a party defendant pursuant to 28 U.S.C.A. § 2410. Invoking 28 U.S.C.A. § 1444, the United States removed the cause to the United States District Court for the Southern District of Florida.

Pending the foreclosure the property was in the custody of a court appointed receiver who collected rents. The property was sold by a special master at foreclosure sale for $35,000. The special master, under order of the court, retained $14,000 to be disbursed upon a determination of lien priorities as between the Bank and the Government. Payment of the remaining funds was made to the Bank. The district court held, initially, that the Bank had a prior lien for the so-called primary obligations consisting of the principal balance of the $24,000 note, interest thereon, property taxes, abstract costs, and attorneys' fees and court costs in foreclosure. The district court also held, initially, that the claims of the United States became liens upon the property on the death of Mrs. Kimbel, that the mortgage did not secure the obligations for which Mrs. Kimbel was not liable, and that the United States should receive the proceeds to the extent of the excess over the primary obligations. Judgment was accordingly entered. On rehearing, it was determined that the mortgage was ambiguous. Parol evidence was received as to the intent of C. Albert Kimbel and Ida T. Kimbel in executing the mortgage with respect to securing the individual obligations of Mr. Kimbel. On this evidence

the district court found that it was the intent of Mr. and Mrs. Kimbel that the mortgage should secure the individual obligations of C. Albert Kimbel to the Bank, both those existing at the time of and those incurred subsequent to the mortgage. So finding, the district court concluded that the Bank had a lien for all of the Kimbel obligations, several as well as joint, and irrespective of whether incurred prior or subsequent to the mortgage, and that the Bank's lien was, in its entirety, superior to the claims of the Government. As a result of these determinations an amended judgment was entered awarding all proceeds of the foreclosure sale to the Bank. From this judgment the United States has appealed.

At the time the mortgage to the Bank was given the property was held by the Kimbels as an estate by the entireties. As was recently said by the Supreme Court of Florida,

> "The required elements of unity of possession, interest and control peculiar to an estate by the entirety are so well known that an extensive discussion would not be justified. The estate is one peculiar to the relationship of husband and wife and is not available to people in any other relationship. Aside from unity of control, possibly the most important incidents of a tenancy by the entirety are that the survivor of the marriage, whether husband or wife, is entitled to the whole estate and that any property so held is not subject to execution to satisfy the debts of either of the parties individually." *Winters v. Parks*, Fla. 91 So. 2d 649. See *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376; *Stanley v. Powers*, 123 Fla. 359, 166 So. 843; *Vaughn v. Mandis*, Fla. 53 So. 2d 704; *Sheldon v. Waters*, 5th Cir. 1948, 168 F. 2d 483; 5 Miami L. Q. 592.

We do not question the rule that liens for Federal taxes and the manner of their enforcement are matters which are governed by the Federal law. Bank of Nevada, 9th Cir. 1957, 251 F. 2d 820. However, the rules of property and fixing the incidents of property ownership are rules of state law which the Federal courts will respect. *Poe v. Seaborn*, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239. The question as to whether a lien for taxes owing to the United States by a husband attached to property held by the entireties was considered by the Eighth Circuit Court of Appeals. It said:

> "* * * the individual interest of the husband or wife in an estate by the entirety is, like a rainbow in the sky or the morning fog rising from the valley, not such an estate as may be subjected to the grasp of an attaching creditor or which will permit the adherence thereto of a tax lien. We are not at liberty to change the nature of either." *United States v. Hutcherson*, 8th Cir. 1951, 188 F. 2d 326, affirming *Hutcherson v. United States*, D.C.W.D.Mo. 1950, 92 F. Supp. 168. See *Raffaele v. Granger*, 3rd Cir. 1952, 196 F. 2d 620.

While refraining from concurrence in dicta regarding rainbows and fogs, we express our concurrence in the conclusions of the Hutcherson case regarding the attaching of a tax lien upon an estate by the entireties. Plumb, Federal Tax Collection and Lien Problems, 13 Tax Law Review, 247. The husband, C. Albert Kimbel, did not have any interest in the subject property during his wife's lifetime to which a lien for Federal taxes, owed by him but not by her, could attach. Upon Mrs. Kimbel's death the tax lien attached to the property as of the time of her death. *Johnson v. Leavitt*, 188 N.C. 682, 125 S. E. 490. Cf. *Moralis v. Matheson*, 75 Fla. 589, 79 So. 202; *Newman v. Equitable Life Assur. Soc.*, 149 Fla. 641, 160 So. 475. The mortgage, executed by both Mr. and Mrs. Kimbel, had a priority of lien over the tax lien of

the Government. The mortgage secured the principal and interest of the note which was specifically described in the mortgage, advances of the Bank for taxes on the mortgaged property and the costs and charges incident to foreclosure. Remaining for our consideration is the question whether the mortgage secured other obligations to the Bank for which C. Albert Kimbel was liable to the Bank.

The mortgage provision which is to be construed is commonly known as a dragnet clause. It has been said that such clauses should be carefully scrutinized and strictly construed. *First v. Byrne*, 238 Iowa 712, 28 N. W. 2d 509, 172 A.L.R. 1072. In construing such a clause in a collateral pledge agreement the Supreme Court of Florida used this language:

> "What everybody knows the courts are assumed to know, and of such matters may take judicial cognizance. It is a matter of common knowledge that banking institutions, in transactions wherein they advance money with or without security, dictate the terms upon which such money will be loaned or advanced, and the borrower in such cases must agree to the terms and conditions stated and made by the bank in order to procure the loan. Therefore the court may legally presume that the bank dictated the terms and conditions under which the sum of $2,312 was procured by Aylin from the bank, and the terms and conditions under which the other notes were deposited by Aylin with the bank as collateral security. When this presumption is indulged in, as it was evidently indulged in by the chancellor, then the rule that one of the parties to a contract, having chosen the language applied and being responsible for any alleged uncertainty and ambiguity, must suffer the result of having such language construed against him, may be invoked." *St. Lucie County Bank & Trust Co. v. Aylin*, 94 Fla. 528, 114 So. 438, 440.

Here it is unnecessary to indulge in a presumption that the words of the dragnet clause are those of the Bank. Its counsel testified that he had inserted the clause in the mortgage. Estates by the entireties have been regarded with tender solicitude by the Florida courts. *Peterson v. Brotman*, Fla., 100 So. 2d 821.

It may well be that the mortgage would not have secured a note given to the Bank by Mr. Kimbel alone or by Mrs. Kimbel alone prior to the execution of the mortgage. The dragnet clause purports to secure sums due the Bank from the "mortgagors". We think the reasoning of the Supreme Court of Georgia is sound. It held:

> "Since the 'grantor' consisted of the three individuals who executed the security deed, a note signed by only one of them for a debt of himself alone was not an indebtedness of the grantor within the meaning of the security deed." *Americus Finance Co. v. Wilson*, 189 Ga. 635, 7 S.E. 2d 259. See *Monroe County Bank v. Qualls*, 220 Ala. 499, 125 So. 615.

The only doubt which we have as to the applicability of the doctrine stated in the foregoing quotation to the case before us arises from the provision that "mortgagor" shall be "plural jointly and severally if more than one." Cf. *Torrance v. Third National Bank*, 3rd Cir. 1914, 210 F. 806; *Heffner v. First National Bank*, 311 Pa. 29, 166 A. 370, 87 A.L.R. 610. The obligations represented by the note of Duval Electric Co. and Thompson were owed to the Bank by C. Albert Kimbel only as a partner or as an endorser. They were not his liabilities in an individual and personal capacity. In construing the Florida statutes, where the context will permit, "The word 'person' includes * * * partnerships * * *." F.S.A. § 1.01(3). It is unnecessary for our decision here that we determine whether a partnership is a

true legal entity. See 40 Am. Jur. 137, Partnership § 18. The Supreme Court has said, "The partnership is a distinct thing from the partners themselves and it would seem that debts of the firm are different in character from other joint debts of the partners." *Forsyth v. Woods*, 78 U. S. (11 Wall.) 484, 20 L. Ed. 207. So, a fortiori, debts of a partnership differ in character from the debts of a husband and wife or either of them. In an early, but frequently cited, New York case it was held:

> "The plaintiff [bank] was dealing with him individually, and it was obtaining security for his individual and personal obligations, and a fair construction of the language shows that it was intended to secure such obligations, and such only. * * *
>
> "This mortgage must be regarded as a commercial instrument, executed in commercial transactions, and must be construed as ordinary commercial men would understand the language used; and we think that among business men a distinction is made between the firm, as an entity, and the members who compose it; and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was a member, and for whose debts jointly with the other members of the firm he could be made responsible." *Bank of Buffalo v. Thompson*, 121 N.Y. 280, 24 N. E. 473.

We conclude that it was not the intent of the parties to regard the obligations of a partnership of which the husband was a member as obligations "due to the mortgagee from the mortgagors." If it was intended that the mortgage should secure the obligations of the partnership and the liabilities of C. Albert Kimbel as an endorser, language different from that which was used was required to declare

such intent. *Heffner v. First National Bank, supra; New Bethlehem Trust Co. v. Spindler,* 315 Pa. 250, 172 Atl. 309. See *Waterman v. Alden,* 143, U. S. 196, 12 S. Ct. 435, 36 L. Ed. 123; In re Evans, 3rd Cir. 1917, 238 F. 543; *Torrance v. Third National Bank, supra; Commissioner v. Lehman,* 2nd Cir. 1948, 165 F. 2d 383. That the rule here stated is the law of Florida is indicated by *St. Lucie County Bank & Trust Co. v. Aylin, supra.* The Bank's advances on the partnership paper were to and for the benefit of the partnership. Hence we need not consider whether a different rule would be applicable if the proceeds of the partnership paper had been received by Kimbel individually for his personal use. Cf. *Silva v. Exchange Nat. Bank,* Fla. 56 So. 2d 332. The instrument before the court in the St. Lucie County Bank case, and in some of the other cases herein cited, was a pledge of personal property rather than a mortgage upon real estate, but there is no reason why the construction of a dragnet clause in one should be different when it is found in the other.

C. A. Kimbel was an accommodation endorser upon eleven notes of Duval Electric Company, Inc., a corporation, to the Bank given subsequent to the execution and delivery of the mortgage. It follows, of course, that since the mortgage was not security for Kimbel's pre-existing liability on the note of the partnership and his obligation as an endorser, the subsequent notes of a corporation upon which he was an accommodation endorser were not secured. We think there are further reasons why these subsequent obligations were not secured by the mortgage. To hold that such obligations could be so secured would authorize a husband to so increase the extent of a mortgage lien upon an estate by the entireties without the wife's knowledge as to extinguish the remaining interest in the mortgaged property. Such a construction should not be adopted. *First Bank & Trust Co. v.*

Welch, 219 Iowa, 318, 258 N. W. 96. There was no compliance with the conditions of the Florida statute relating to mortgages securing future advances which requires a statement as to the maximum amount to be secured. F.S.A. § 697.04. *Downing v. First National Bank*, Fla. 81 So. 2d 486.

Ordinarily the construction of a contract is a question of law. *City of Leesburg v. Hall*, 96 Fla. 186, 117 So. 840. In applying to the dragnet clause of the mortgage the proper rules of construction we do not think there is any ambiguity in the language such as requires extrinsic evidence to ascertain its meaning. *O'Brien v. Elder*, 5th Cir. 1957, 250 F. 2d 275.

Deciding, as we do, that the mortgage to the Bank had priority over the Government tax lien only to the extent of the note of both of the Kimbels, with interest, advances for taxes, and the costs, fees and charges of foreclosure, a different judgment must be entered. To that end, the judgment appealed from is

REVERSED AND REMANDED.

LE COPY.

Office-Supreme Court, U.S.
FILED
SEP 5 1958
JAMES R. BROWNING, Clerk

No. 261

In the Supreme Court of the United States

OCTOBER TERM, 1958

AMERICAN NATIONAL BANK OF JACKSONVILLE,
PETITIONER,

v.

UNITED STATES OF AMERICA AND TITLE & TRUST COMPANY OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,
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UNITED STATES OF AMERICA AND TITLE & TRUST COMPANY OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 30-39) is reported at 255 F. 2d 504. The findings of fact and conclusions of law of the District Court (Pet. 19-29) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1958. (Pet. 30.) A timely petition for rehearing was denied on June 26, 1958. (R. 176.) The petition for certiorari was filed on August 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether, under Florida law, a so-called "dragnet clause" of a mortgage given by husband and wife, tenants by the entireties, is to be construed as securing obligations of the husband alone, arising out of his obligations as a partner or as an endorser.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such a person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, 882]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

> (a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> * * * * * *

26 U.S.C. 1952 ed., Sec. 3672(a)).

STATEMENT

The facts, as set out in the agreed statement (R. 1-10), may be summarized as follows:

This suit was brought by the American National Bank of Jacksonville, Florida (hereinafter referred to as the bank), to foreclose a mortgage from C. Albert Kimbel (hereinafter referred to as the taxpayer) and his wife Ida T. Kimbel. The mortgage was dated June 17, 1953, and recorded on June 18, 1953. In addition to taxpayer, several parties claiming liens against properties in his name, including the United States, were made parties defendant. (R. 1-2.)

The mortgage was given to secure a primary note in the face amount of $24,000, and covered property held by the spouses as an estate by the entireties. (R. 5, 11-14.) After removal of the cause to the District Court, that court, pursuant to stipulation by the bank and the United States, entered its summary decree of foreclosure, adjudging that the bank had a lien to secure a total due on this note of $28,515.13, representing the balance due on the principal, taxes advanced, interest on the foregoing, costs, and attorneys' fees. The question of priority of this lien against the United States, claiming liens for taxes in the amount of $12,200.23, was reserved for future determination. (R. 3, 5.)

Thereafter, the property was sold for $35,000. (R. 4.) Of the amount received from the sale, $14,000 was held out, and the parties litigated over that sum (R. 4), the balance being paid to the bank (R. 6). Since the claims of the bank and of the United States far exceeded the proceeds of the sale, and the claims of all other defendants were found to be subsequent

in point of time and/or law to the former claims, no specific findings as to their interests were made. R. 6.) In the litigation over the $14,000, the Title & Trust Company of Florida, which had insured the primary mortgage indebtedness, was permitted to intervene to oppose the claim of the United States to priority over the bank's primary mortgage indebtedness. (R. 4.)

The United States based its claim on Federal Insurance Contributions Act and Federal Unemployment Tax Act taxes, which were duly assessed, and claims of lien which were duly recorded as against the taxpayer at various times between January 10, 1952, and July 23, 1954. Most of the filings of notice of lien were before June 17, 1953, the date of the mortgage. (R. 5.) Mrs. Kimbel died on December 1, 1954.

The District Court held that although notices of the majority of the Government's claims of lien were recorded prior to the time of the mortgage, they did not constitute liens upon the estate by the entireties, but did become liens on the real property on the death of Ida T. Kimbel on December 1, 1954. (R. 57.) The Court of Appeals agreed. (Pet. 33-34.)

The mortgage contained the following typed clause (Pet. 31), referred to by the court below as a "dragnet clause" (Pet. 35):

> The Mortgagors hereby agree that the lien of this mortgage shall, in addition to the note hereby secured, secure all sums of money which may now be due or may hereafter become due to the Mortgagee from the Mortgagors. This additional security provision shall remain in effect for so long as the promissory note hereby secured remains unpaid.

The question here raised is whether by this clause the mortgage covered, in addition to the principal note for $24,000, three additional items, as follows:

(1) The obligation of the taxpayer on a note to the bank dated February 15, 1953, signed "Duval Electric Co., C. A. Kimbel, Pres." (R. 23-24.) Duval Electric Company was a partnership, of which the taxpayer was a partner.

(2) The obligation of the taxpayer on a note dated February 27, 1953, of T. H. Thompson, discounted by the bank, which was payable to and endorsed by Duval Electric Co. (R. 25). This note was also endorsed by taxpayer. (R. 26.)

(3) The obligation of the taxpayer as an accommodation endorser on eleven notes of the Duval Electric Company, Inc., a corporation, to the bank, given subsequent to the execution and delivery of the mortgage. (R. 29-50.)

The District Court held that these individual obligations of the taxpayer to the bank were secured by the mortgage, holding the "dragnet clause" to be ambiguous and therefore permitting parol evidence to aid in the construction of the instrument. (R. 102-104.)

The Court of Appeals disagreed, construing the "dragnet clause" as not covering the individual obligations of the taxpayer arising out of his actions as a partner (Pet. 35-38) or out of his action as an endorser of the corporation's notes (Pet. 38). Finding no ambiguity in the language, it did not consider extrinsic evidence to ascertain its meaning. (Pet. 39.)

ARGUMENT

The question as to which review by this Court is sought is solely one of state law, involving the interpretation of a particular clause in a mortgage. It is a question on which there appears to be no direct authority from the state courts, none being cited, and as to which there is no conflict between the Court of Appeals and state decisions. The opinion of the Court of Appeals is clearly an attempt to discover what, in the absence of state decisions, is the proper interpretation of the "dragnet clause" in the Florida mortgage given by tenants by the entireties,[1] and the determination of local law therein made is such as would ordinarily be accepted by this Court. *Ragan v. Merchants Transfer Co.*, 337 U.S. 530, 534.

There is no federal question involved, nor any conflict with the decisions of this Court. Contrary to the petitioner's suggestion (Pet. 10-11), it is apparent that the Court of Appeals was not stating that a partner is not individually liable for partnership debts (cf. *Francis v. McNeal*, 228 U.S. 695). Rather, the court was concerned that a wife's interest in her residence held in tenancy by the entireties should not be put at stake, not merely by her husband's actions, but also by those of other persons, unless her intent to so risk her interest should clearly appear from the language employed.

The decisions of this Court and the Florida courts cited by the petitioner (Pet. 11-13) merely express gen-

---

[1] The opinion of the Court of Appeals was written by Judge Warren L. Jones, a Florida practitioner for nearly thirty years prior to his appointment to the court. Cf. *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708.

eral rules as to the construction of written instruments, i.e., that statutes and documents are to be interpreted as a whole, or that parol evidence may be introduced, not to vary a written instrument, but to explain it. Such general principles do not determine whether there is such ambiguity in a particular written instrument as to call for explanation, and do not govern the interpretation of a particular clause. Petitioner's contentions in this respect were brought to the attention of the Court of Appeals in its petition for rehearing, which was denied. The court did not purport to disagree with these principles. Rather, its denial of the petition for rehearing signifies that it regarded them as inapplicable in construing the particular clause involved, and that it adhered to its opinion that the clause could not, as a matter of law, be construed as covering the obligations here in question, so that there was no occasion for the consideration of parol evidence. Petitioner is merely asking this Court to take the case to construe for itself the "dragnet clause" of a particular mortgage, or at most to establish a rule of Florida property law.

Contrary to the petitioner's final contention (Pet. 13-14), it is obvious, as we have indicated above, that the court below did not disregard state law on a question of property, but was attempting to determine what the state law is and to apply it. Its action in so doing was in agreement, rather than in conflict, with the cases of *Poe* v. *Seaborn*, 282 U.S. 101, 110, and *Commissioner* v. *Stern*, 357 U.S. 39, 45. It did not purport to set out any federal rule, but, using such guides as were available in the decisions of Florida and other jurisdictions, it undertook to arrive at the correct Florida rule.

In any event, we submit that the result reached here is correct for the additional reason, not accepted by the courts below, that the federal tax lien on the interest of the taxpayer in the property held as a tenant by the entireties was prior to the lien of the mortgage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
ANDREW F. OEHMANN,
Acting Assistant Attorney General.
ROBERT N. ANDERSON,
DAVID O. WALTER,
Attorneys.

SEPTEMBER, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

vs.

UNITED STATES OF AMERICA AND
TITLE & TRUST COMPANY OF FLORIDA,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF TO UNITED STATES BRIEF IN OPPOSITION

W. GREGORY SMITH
Attorney for Petitioner
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Bank Building
Jacksonville 7, Florida

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ARGUMENT

The Brief for the United States in opposition to our Petition for Certiorari falls so far short of the mark that we deem it wise to file this Reply Brief. Furthermore, we have discovered the pendency in this Court of related cases, which we feel should be called to the attention of the Court.

The Petition for Certiorari makes these points with regard to the decision of the Circuit Court of Appeals, a review of which is sought: (1) The case involves the securing of the National Rights. (2) The decision below, as regards the consideration of the partnership obligation, went beyond the record and, without the aid of briefs or argument, contravened a decision of this Court, as well as (3) a decision of the same Circuit Court of Appeals. (4) As regarded rules of construction of contracts, the decision is in conflict both with decisions of this Court and of the Supreme Court of Florida. (5) The action of the Circuit Court of Appeals calls for the exercise of this Court's power of supervision. (6) In failing to apply State Statutes and State Decisional Law, the Circuit Court of Appeals has acted unconstitutionally.

We think we are correct in saying that the Government's Brief in Opposition completely ignores points (1), (2), (3), (5) and (6), and treats our Petition as though it raised only (4).

The matters reaching this Court have a tendency to sustain us in our contention that the case involves the securing of the National Rights, in the sense that it involves unjust interference by the tax collection procedure with the business of the Nation, thus involving the people of the Nation as distinguished from the Government itself. There are now pending before this Court the following Petitions for Certiorari which involve similar cases demonstrating the interference which we assert exists: No. 132, Aquilino vs. United States; No. 215, Goldstein vs. United States; and No. 300, United States vs. Hulley.

Aquilino and *Hulley* involve rights of lien claimants under State mechanics' and materialmen's liens, where the tax collecting authorities seek to obtain for the United States priority

over the lien claimants against monies receivable by the taxpayer, which could never have come into existence without the service of the lien claimants, who, in reality, created the fund in litigation by their services or materials. In these cases, the taxpayer could never have been entitled to the receivable free of the claims of the lien claimants, yet the United States seeks to place itself in better position as regards these lien claimants than the taxpayer itself could have been.

In *Goldstein*, there is involved the question whether the United States can take an asset of the taxpayer produced by the services of an attorney in priority to the attorney's right to compensation. As we understand the Goldstein record, the tax collection authorities very sensibly told Mr. Goldstein to go ahead with his services in the condemnation case against the taxpayer to produce and realize upon an asset for the taxpayer, indicating that they would not interfere with his right to compensation. This seemed most sensible, as there would be no fund out of which to collect the tax unless the attorney proceeded, or unless the United States Attorney intervened and represented the taxpayer in the condemnation-- in which event this Court can very well imagine the danger of an inadequate condemnation award-- so he was told to proceed and told that the Government would not seek priority over him, and yet, when his services were complete and he sought to realize on same, the Government successfully contended that it had a prior right to the funds. *Goldstein* alone would seem to justify Mr. Plumb's mention of the strong tendency to "rob Peter to pay Paul's taxes".

We feel justified in asserting that the causes pending in this Court show an undue zealousness for the Federal revenue, morally unjustifiable, economically unsound and legally unjust.

Although, without strict pertinency to our position here, but because they relate indirectly to this portion of our argument, we cite to the Court the cases of *U. S. v. Durham Lumber Co.* (4th Circuit, No. 7619, July 18, 1958, not yet reported in Federal Reporter) and *Aetna Casualty & Surety Co. vs. U. S.*, 4 N. Y. 2d 639, both of which were decided against the Government, and, so far as we know, neither of which has been brought to this Court. These cases seem to lie within the range of *Aquilino* and *Hulley*. On the sidelines, one wonders why the Government filed a Petition in *Hulley* which cites neither *Aetna* nor *Durham Lumber*. While wondering, one wonders why the Government suggests reversal in *Hulley* "without oral argument or further briefs".

Since the United States, by the wave of the Solicitor General's hand, ignores so completely our contention of the existence of a departure from the record, with the result of undue protection of the Federal revenue, we now wish to bolster our previous position by pointing to the Appellant's Statement of Points to be relied upon in its appeal in this case, as filed in the District Court in connection with the Government's appeal to the Circuit Court of Appeals, which points appear at R. 109 and 110. Point 2 was that:

> "2. The District Court erred in admitting parol evidence to show that (the) mortgage ... was ... intended to secure the individuals obligations of C. Albert Kimbel ..."

We asserted in the Petition that the Circuit Court of Appeals took it upon itself to go beyond the record and to decide that the partnership and endorser obligations were not the liabilities of Kimbel "in an individual and personal capacity". The decision below contains the following language:

"The obligations represented by the note of Duval Electric Co. and Thompson were owed to the Bank by C. Albert Kimbel only as a partner or as an endorser. They were not his liabilities in an individual and personal capacity. In construing the Florida statutes, where the context will permit, 'The word 'person' includes • • • partnerships • • •.' F.S.A. Sec. 1.01(3). It is unnecessary for our decision here that we determine whether a partnership is a true legal entity. See 40 Am. Jur. 137, Partnership Sec. 18. The Supreme Court has said, 'The partnership is a distinct thing from the partners themselves and it would seem that debts of the firm are different in character from other joint debts of the partners.' *Forsyth v. Woods*, 78 U. S. (11 Wall.) 484, 20 L. Ed. 207. So, a fortiori, debts of a partnership differ in character from the debts of a husband and wife or either of them. . . .

"We conclude that it was not the intent of the parties to regard the obligations of a partnership of which the husband was a member as obligations 'due to the mortgagee from the mortgagors.' If it was intended that the mortgage should secure the obligations of the partnership and the liabilities of C. Albert Kimbel as an endorser, language different from that which was used was required to declare such intent. . . ."

Pet. 36, 37 and 38.

We submit that it is crystal clear that the Circuit Court of Appeals distinguished between a man's obligation as a partner or endorser on the one hand, and other types of individual liabilities on the other hand. We know it to be true that the United States never asserted the existence of any such difference. We know by virtue of the following authorities

that Kimbel owed the past due partnership obligation and the endorser obligation on the past due note, as much as he owed his electric light bill or any other personal obligation. We assert that the following authorities demonstrate that we are correct, and we add that these authorities were timely called to the attention of the Circuit Court of Appeals and ignored:

Francis v. McNeal, 228 U. S. 695;

Underwood v. United States, 118 F. 2d 760;

Sec. 674.20 F. S. A.;

Sec. 674.68 F. S. A.;

and see other authorities in Petition and in our Brief on Petition for Rehearing in the Circuit Court of Appeals.

The Statutes mentioned were definitive of the obligation of Kimbel on the Note in question, yet were completely ignored. This, we insist, was failure to follow State law.

Since these State Statutes were ignored, we feel confident in our assertion that the Circuit Court of Appeals proceeded unconstitutionally within the meaning of *Erie R. Co. v. Tompkins*, 304 U. S. 64.

We must again point out that it is a surplus over which the parties are litigating, which surplus would be consumed by application to the partnership Note of February 15, 1953, rendering unnecessary any consideration of the other Notes. This partnership note is item (1) on page 5 of the Government's Brief. No adversion to the obligations enumerated

(2) and (3) on that page is necessary, if Petitioner is right concerning said first obligation.

In the case at bar, there should be no serious question but what due process of law has been denied to the Petitioner. The greatest essential of due process is the right to be heard. We were never heard on this supposed crucial distinction made by the Circuit Court of Appeals between one's "individual obligations", as a group of obligations distinct from one's obligations on past due endorsed notes and past due partnership notes, and the Government's Brief fails to acknowledge that such a distinction was made. In fact, again we find the wave of the hand on page 5 of the Government's Brief thus:

> "The District Court held that these individual obligations of the taxpayer to the bank were secured by the mortgage, holding the 'dragnet clause' to be ambiguous and therefore permitting parol evidence to aid in the construction of the instrument. (R. 102-104.)
>
> "The Court of Appeals, disagreed, construing the 'dragnet clause' as not covering the individual obligations of the taxpayer arising out of his actions as a partner (Pet. 35-38) or out of his action as an endorser of the corporation's notes (Pet. 38). Finding no ambiguity in the language, it did not consider extrinsic evidence of ascertain its meaning. (Pet. 39)"

The Court of Appeals did not disagree. It *distinguished* between "individual obligations" and "individual obligations ... as ... partner or ... endorser" -- a distinction not made by the District Court, counsel for the Government or either of the other parties, neither briefed nor argued.

When the State Statutes governing Kimbel's liability on this

first Note was called to the attention of the Circuit Court of Appeals by Petition for Rehearing, it ignored them and thereby proceeded unconstitutionally.

To have the matter readily before the Court, we call to the attention of the Court the fact that Section 674.68 F.S.A. (Pet. 17) defines the engagement of the endorser as that, on presentment of the Note

> "It shall be .... paid ... and ... if it be dishonered ... he will pay the amount thereof ...".

At the time of the execution of the mortgage in question, this Note was already past due, and the endorser's liability was, therefore, primary. And then there is the provision of Section 674.20 F.S.A. (Pet. 16) that

> ... one who signs in a trade ... name will be liable ... as if he had signed in his own name".

Duval Electric Co. was a partnership tradename, as was ruled by the same Circuit Court of Appeals in *Underwood v. United States*, 118 F. 2d 760, where the language was used:

> "Hanover Refining Company (a partnership) was merely a trade-name .... The partners were liable individually for any debts contracted in the name of the Company ..." (Bracket supplied)

Last, but not least, we call attention to a most important tactic adopted by the Solicitor General's office: They fail to file in this Court a Cross-Petition as regards the decision of the Circuit Court of Appeals to the effect that the Government lien against the husband is not a lien upon the estate by the entireties held by husband and wife, yet, at page 8, they

say that that point which they unsuccessfully urged below, should be a reason for denying certiorari. In this manner the Government seemingly shows a reluctance to face the tenancy by the entirety issue squarely, and apparently hopes to be able later to contend that this point is still open to it and, a favorable view toward the Government could exist by reason of denial of certiorari herein, if it be denied. The record clearly demonstrates that Title & Trust Company of Florida is the one party in this case interested, in opposition to the Government, in this phase of the case. Petitioner was insured by Title & Trust Company of Florida against there being any liens prior in dignity to that securing Petitioner in its primary obligation. If denial of certiorari were based upon that point, Petitioner would be made whole by Title & Trust Company of Florida. If denial of certiorari were upon that ground, and the ground were not expressed, Petitioner, with no possibility of redress, would lose the benefit of the title insurance policy it holds. And, be it here noted, the Government does not see fit to apprise this Court of the reasoning back of its contention that certiorari should be denied upon this particular ground, whereas heretofore the subject-matter of this ground has been the Government's motivation for appellate proceedings. This Petitioner has not heretofore briefed or argued and should not now be compelled to brief or argue this point, particularly since we would have to take the initiative, the Government not even having seen fit to argue in support of the point. To combat this last point, we are requesting the Clerk of the Circuit Court of Appeals to furnish us for filing with the Record heretofore filed, nine copies of the Brief of Title & Trust Company of Florida in the Circuit Court of Appeals.

In summary, it seems to us that the decision of *Erie R. Co. v. Tompkins*, newly applied to this field by *Commissioner v. Stern* and *United States v. Bess*, requires a sweeping review

of the decisions of this and other lower Federal Courts in the field of priority of Federal Tax Liens and that the case at bar and related cases of *Aquilino, Goldstein* and *Hulley* not only afford the opportunity of such review, but require same, especially when this Court realizes the impact which *Commissioner v. Stern* and *United States v. Bess* are having, as illustrated by such cases as *Durham Lumber* and *Aetna*. Further to demonstrate the necessity for such sweeping review, we call to the Court's attention the fact that most of the cases which have created the serious impingement on business have been the per curiam decisions. In one of the few cases where this Court has permitted briefs on the merits and oral argument, even before *Commissioner v. Stern*, there were four dissents in *United States v. Ball*. These four dissents clearly demonstrate doubt as to the correctness of the principles applied in the earlier cases even assuming it is a Federal question and not a question of State property law as indicated by *Commissioner v. Stern* and *United States v. Bess*.

We submit that our Petition for Certiorari should be granted.

Respectfully submitted,

W. GREGORY SMITH,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Brief has been made on each of the following parties in the manner indicated:

On the:

Solicitor General,
Department of Justice,
Washington 25,
D.C.;

by mailing same to him with air mail postage prepaid, addressed as above.

On the United States Attorney for the Southern District of Florida, and on Ray W. Richardson, Jr., Attorney for Respondent, Title & Trust Company of Florida, by delivery, at the office of counsel, to counsel or a Clerk therein.

W. GREGORY SMITH,
Attorney for Petitioner.

(The Financial News Corporation, Jacksonville, Florida—9—58)

FILE COPY

MOTION FILED APR 21 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 261

AMERICAN NATIONAL BANK OF JACKSONVILLE,

Petitioner,

against

UNITED STATES OF AMERICA, AND
TITLE & TRUST COMPANY OF FLORIDA

Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME

AND

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

MOTION

Petitioner respectfully moves for leave to file, out of time, the annexed petition for rehearing of the order of this Court (3 L. Ed. 2d, 72) entered October 13, 1958. This motion and the annexed petition are based on the following grounds:

1. Subsequent to the denial of the petition for certiorari herein, this Court has decided to review *Aquilino v. United*

States, case No. 132 of this term, a case involving a point related to and which could have been determinative of this cause, namely, unconstitutional procedure of the lower court within the meaning of *Erie R. Co. v. Tompkins*, 304 U. S. 64, in determining priorities as a matter of property right in a dispute involving a Tax Lien of the United States.

2. Also subsequent to the denial of certiorari herein, this Court has granted certiorari on February 24, 1959, in case No. 579, *United States v. Durham Lumber Co.*, a case likewise involving such point, where the Solicitor General had sought summary reversal of a decision applying State Law in similar circumstances.

3. Also subsequent to the denial of certiorari herein, this Court has, on January 26, 1959, in *Hermann v. Rogers* (No. 572) decided a case sufficiently like *Durham Lumber* and the case at bar to be considered in direct conflict with the results there reached. If State law was properly applicable to decide *Hermann v. Rogers, Durham Lumber* and the case at bar ought likewise to be decided by the application of State law. The Law Edition editors annotation thereto in 3 *Law Ed.* 2d, 345, 346, represents the universal thinking in attributing *Hermann v. Rogers* to *Erie R. Co. v. Tompkins* and the constitutional point decided by it.

4. Fairness requires reconsideration of the denial of certiorari herein, in order that this Petitioner may have whatever benefit might flow to it from the court's consideration of *Aquilino* and *Durham Lumber*.

JURISDICTION

The jurisdiction of this Court to entertain the petition for certiorari herein was not denied by the respondent's brief in opposition thereto. The term at which the petition was denied is still in session. This Court has consistently granted Motions of the character of this Motion, when the ends of justice so require. *United States v. Ohio Power Co.*, 351 U. S. 980; *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183.

PRAYER FOR RELIEF

Wherefore, petitioner prays that this Motion be granted and that the annexed petition for reahearing be granted and that, on such hearing, the petition for certiorari be granted and the judgment appealed from be reversed, and for such other and further relief as this Court may deem just and proper.

Dated: Jacksonville, Florida,

April 14th, 1959

Respectfully submitted,

W. GREGORY SMITH,
216 American National Bank Building,
Attorney for Petitioner,
Jacksonville 7, Florida

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 261

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Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner prays that this Court grant a rehearing of its order of October 13, 1959, (3 L. Ed. 2d, 72) denying certiorari herein and prays that the Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this cause, as prayed for by the Petition for Certiorari filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time this Court's order denying certiorari was entered, this Court did not have before it and had not granted certiorari in *Aquilino v. United States*, No. 132, and *United States v. Durham Lumber Co.*, No. 579. Those cases, and this

case, present the constitutional question whether State law or Federal decisions determines property rights in cases involving Federal Tax Liens. Since this Court is going to review its decisions in this field, it is apropos that this case be decided in the light of that review.

2. At the time of the denial of certiorari herein, this Court had not determined *Hermann v. Rogers* (No 572), decided January 26, 1959, where this Court unanimously applied State property law to determine the rights of the United States to property, and the decision in the case at bar is in direct conflict therewith.

3. The Court's actions, without opinion, in this case (No. 261), in *Goldstein* (No 215), and in *Hulley* (No 300), seemed to indicate abandonment by this Court of the doctrine of determination of property rights according to State Law, announced in *Commissioner v. Stern*, 2 L. Ed. 2d 1126, and in *United States v. Bess*, 2 L. Ed. 2d 1135. If, now, reaffirmation of that doctrine is about to occur, as granting certiorari in *Aquilino* and *Durham Lumber* might indicate, and as the Court's action on January 26, 1959, in *Rogers v. Calumet National Bank of Hammond* (No. 468) and in *Hermann v. Rogers* (No. 572) might further indicate, then it would be unjust not to reconsider the denial of certiorari in the instant case, so that same might be governed by the rule about to be further considered. Fairness requires such. See *Cahill v. New York, N. H. & H. R. Co.*, 351 U. S. 183, 100 L. Ed. 1075, 76 S. Ct. 758.

4. It is clear on the record in this case that the Circuit Court of Appeals for the Fifth Circuit failed to apply the Florida Statute law, and otherwise erred, if Florida Law governs the controversy herein.

5. This Court's time will not be consumed materially in the consideration of this case, since it is to review *Aquilino* and *Durham Lumber*. Having this case before it will only slightly broaden the scope of the work involved in those cases. Fairness and justice would not be served by denying this Petitioner the benefit, if any, of such decision as this Court will make in those cases.

6. An analysis by Professor Ernest J. Brown of Harvard Law School, November, 1948, issue, 72 *Harvard Law Review*, 82-87, shows the surprising and puzzling state of law in this field, within the decisions of this very court, and the need for full exploration of the merits.

CONCLUSION

The petition for rehearing should be granted, the denial of certiorari vacated, and the petition for certiorari granted.

Respectfully submitted,

W. GREGORY SMITH,
Attorney for Petitioner,
216 American National Bank Building,
Jacksonville 7, Florida

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

W. GREGORY SMITH,
Attorney for Petitioner,
216 American National Bank Building,
Jacksonville 7, Florida.

CERTIFICATE OF SERVICE

It is hereby certified that service of two copies of this Motion For Leave to File Petition For Rehearing Out Of Time And Petition For Rehearing Of Order Denying Petition For Certiorari has been made on each of the following parties in the manner indicated:

On the:

Solicitor General,
Department of Justice,
Washington 25, D. C.;

by mailing same to him with air mail postage prepaid, addressed as bove.

On the United States Attorney for the Southern District of Florida, and on Ray W. Richardson, Jr., Attorney for Respondent, Title & Trust Company of Florida, by delivery at the office of counsel, to counsel or a Clerk therein

W. GREGORY SMITH,
Attorney for Petitioner.